Office-Supreme Court, U.S.
FILED
JAN 28 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 705

FIRST CONGREGATIONAL CHURCH AND SOCIETY OF BURLINGTON, IOWA, FIRST CONGREGATIONAL CHURCH OF PONTIAC, MICHIGAN, FIRST CONGREGATIONAL CHURCH OF WAUWATOSA, WISCONSIN, MAYFAIR CONGREGATIONAL CHURCH OF TOLEDO, OHIO, MALCOLM K. BURTON, BRUCE H. MASSELINK, ANGUS MacDONALD, HARRY R. BUTMAN, GLADYS T. KENNEDY, NORMAN S. McKENDRICK, ROY W. ABEL, RICHARD H. PLOCK, JOHN G. PRYOR and FREDERICK GRABOW, suing on behalf of themselves and all others similarly situated,

Petitioners,

against

EVANGELICAL AND REFORMED CHURCH, JOHN T. BEACH, as Treasurer and a member of THE GENERAL COUNCIL OF THE CONGREGATIONAL CHRISTIAN CHURCHES OF THE UNITED STATES, THE BOARD OF HOME MISSIONS OF THE CONGREGATIONAL AND CHRISTIAN CHURCHES, THE AMERICAN MISSIONARY ASSOCIATION, THE CONGREGATIONAL HOME MISSIONARY SOCIETY, THE CONGREGATIONAL CHURCH BUILDING SOCIETY, THE CONGREGATIONAL SUNDAY SCHOOL EXTENSION SOCIETY, THE CONGREGATIONAL BOARD OF MINISTERIAL RELIEF, CONGREGATIONAL EDUCATION SOCIETY, CONGREGATIONAL PUBLISHING SOCIETY, THE ANNUITY FUND FOR CONGREGATIONAL MINISTERS, RETIREMENT FUND FOR LAY WORKERS, THE CORPORATION FOR THE GENERAL COUNCIL OF THE CONGREGATIONAL CHRISTIAN CHURCHES OF THE UNITED STATES, and AMERICAN BOARD OF COMMISSIONERS FOR FOREIGN MISSIONS.

Respondents,

JOHN T. BEACH, as Treasurer of the NATIONAL COUNCIL OF CONGREGATIONAL CHURCHES and FRED HOSKINS and JAMES E. WAGNER, as co-Presidents of the UNITED CHURCH OF CHRIST,

Added Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

LOREN T. WOOD,
Attorney for all Respondents other than American Board of Commissioners for Foreign Missions and Evangelical and Reformed Church,
80 Pine Street,
New York 5, New York.

ORRIN G. JUDD,
Attorney for American Board of Commissioners for Foreign Missions,
655 Madison Avenue,
New York 21, New York.

DAVID W. PECK,
JOHN T. REDMOND,
of Counsel.

PAUL D. MILLER,
Attorney for Respondent Evangelical and Reformed Church,
20 Broad Street,
New York 5, New York.

JOHN W. MUELLER,
Co-Counsel for Evangelical and Reformed Church and Added Respondents, Hoskins and Wagner,
St. Louis, Missouri.

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	4
Statement of the Case	4
The Basis of Union	4
The Cadman Case	6
The New York Court of Appeals' Decision in the Cadman Case	7
The Present Action	10
The Motion Before Judge Dawson	12
The Proceedings Before Judge Dimock	12
The Court of Appeals Decision	14
The Petition Should Be Denied Because the Decision of the District Court and Court of Appeals Are Manifestly Correct and No Reason for Granting a Writ Is Shown	15
Conclusion	22
Appendix	23

Table of Cases Cited

PAGE

Cadman Memorial Congregational Society of Brooklyn, et al. v. Kenyon, 197 Misc. 124, rev. 279 App. Div. 1015, 1074, aff'd 306 N. Y. 151 .....3, *et seq.*

Campbell v. Nassau County, 192 Misc. 821, 82 N. Y. S. 2d 179 (Nassau Co. 1948), aff'd 274 App. Div. 929, 83 N. Y. S. 2d 511 20

Cold Metal Process Co. v. E. W. Bliss Co., 21 F. Supp. 509 (D. C. Del. 1937) 20

Gart v. Cole, 263 F. 2d 244, certiorari denied 359 U. S. 978 21

General Box Co. v. U. S., 351 U. S. 159 3

Huddleston, et al. v. Dwyer, et al., 322 U. S. 232 3

Israel v. Wood Dolson Co., 1 N. Y. 2d 116 21

Ragan v. Merchants Transfer & Warehouse Co., 337 U. S. 530 3

Terraqua Corporation v. Emigrant Industrial Savings Bank, 191 Misc. 302, 77 N. Y. S. 2d 689 (N. Y. Co. 1947), aff'd 273 App. Div. 254, 76 N. Y. S. 2d 610, leave to appeal denied 297 N. Y. 1041 20

United States ex rel. Bauer v. Clark, 161 F. 2d 727 (2nd Cir. 1947) 20

Statutes

New York Civil Practice Act:
Section 482 .....4, 20, 23

Supreme Court of the United States

October Term, 1962

No. 705

FIRST CONGREGATIONAL CHURCH AND SOCIETY OF BURLINGTON, IOWA, FIRST CONGREGATIONAL CHURCH OF PONTIAC, MICHIGAN, FIRST CONGREGATIONAL CHURCH OF WAUWATOSA, WISCONSIN, MAYFAIR CONGREGATIONAL CHURCH OF TOLEDO, OHIO, MALCOLM K. BURTON, BRUCE H. MASSELINK, ANGUS MACDONALD, HARRY R. BUTMAN, GLADYS T. KENNEDY, NORMAN S. MCKENDRICK, ROY W. ABEL, RICHARD H. PLOCK, JOHN G. PRYOR and FREDERICK GRABOW, suing on behalf of themselves and all others similarly situated,

Petitioners,

against

EVANGELICAL AND REFORMED CHURCH, JOHN T. BEACH, as Treasurer and a member of THE GENERAL COUNCIL OF THE CONGREGATIONAL CHRISTIAN CHURCHES OF THE UNITED STATES, THE BOARD OF HOME MISSIONS OF THE CONGREGATIONAL AND CHRISTIAN CHURCHES, THE AMERICAN MISSIONARY ASSOCIATION, THE CONGREGATIONAL HOME MISSIONARY SOCIETY, THE CONGREGATIONAL CHURCH BUILDING SOCIETY, THE CONGREGATIONAL SUNDAY SCHOOL EXTENSION SOCIETY, THE CONGREGATIONAL BOARD OF MINISTERIAL RELIEF, CONGREGATIONAL EDUCATION SOCIETY, CONGREGATIONAL PUBLISHING SOCIETY, THE ANNUITY FUND FOR CONGREGATIONAL MINISTERS, RETIREMENT FUND FOR LAY WORKERS, THE CORPORATION FOR THE GENERAL COUNCIL OF THE CONGREGATIONAL CHRISTIAN CHURCHES OF THE UNITED STATES and AMERICAN BOARD OF COMMISSIONERS FOR FOREIGN MISSIONS,

Respondents,

JOHN T. BEACH, as Treasurer of the NATIONAL COUNCIL OF CONGREGATIONAL CHURCHES and FRED HOSKINS and JAMES E. WAGNER, as co-Presidents of the UNITED CHURCH OF CHRIST,

Added Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the District Court (Dimock, *J.*) granting respondents' motions for a preliminary and separate trial of the defenses of *res judicata* and estoppel by judgment is not officially reported (63a-71a *). The opinion of the District Court (Dimock, *J.*) which denied petitioners' motion to strike respondents' affirmative defenses of *res judicata* and collateral estoppel and upon which the judgment dismissing the complaint was entered is reported at 198 F. Supp. 677. The opinion of the Court of Appeals affirming the judgment of the District Court is reported at 305 F. 2d 724.

The opinion of the District Court (Dawson, *J.*) denying respondents' motions for summary judgment dismissing the complaint is reported at 160 F. Supp. 651 and the opinion of the District Court (Dawson, *J.*) denying the application of others to intervene as parties plaintiffs is reported at 21 F. R. D. 325.

Jurisdiction

Petitioners' statement of jurisdiction is accepted.

---

* References in parentheses, unless otherwise indicated, refer to pages of "Appendix to Plaintiffs-Appellants' Brief" in the United States Court of Appeals, consisting of Volume I, pp. 1a-422a, Volume II, pp. 1b-172b and Volume III, pp. 1c-13c, all of which have been submitted with the petition. References preceded by "R" refer to the record on appeal in the United States Court of Appeals, certain parts of which, submitted with the petition, were handed up to the Court of Appeals in lieu of being printed in the appendices to plaintiffs-appellants' brief. References preceded by "X" refer to pages of the appendix annexed to the petition herein.

Questions Presented

Petitioners' statement of the questions they would present could be accepted, but the questions can be more simply stated: Were the issues raised by plaintiffs in this action adjudicated in the class action brought by the plaintiffs in *Cadman Memorial Congregational Society of Brooklyn, et al.* v. *Kenyon*, 306 N. Y. 151 (1953) (herein referred to as the *Cadman* case), and were the interests of the present plaintiffs (petitioners) in those issues included in the class interests represented by plaintiffs in the *Cadman* case, and are the defendants in this action entitled to the benefit of the adjudication in the *Cadman* case, so that the *Cadman* decision is *res judicata* as to the present action.

No federal question is presented, and we submit that the questions which petitioners would present of the effect of a prior decision of the New York Court of Appeals on the same subject matter, as determined by the District Court and a unanimous Court of Appeals, is neither of a constitutional or general interest which would warrant a review by this Court.

Admittedly, as petitioners assert (Petition, p. 23), the federal courts, whose jurisdiction was invoked by diversity of citizenship, were required to follow the law of New York as to the scope and elements of *res judicata*. Both the District Court and Court of Appeals acknowledged this to be their obligation and action. There is therefore no reason for this Court to depart from its time honored practice of ordinarily accepting the Court of Appeals' interpretation of local law. *General Box Co.* v. *U. S.*, 351 U. S. 159; *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530; *Huddleston, et al.* v. *Dwyer, et al.*, 322 U. S. 232.

Statutes Involved

In addition to the statutes set forth in the petition, this case also involves Section 482 of the New York Civil Practice Act (Gilbert-Bliss, Civil Practice of New York, Book 4, p. 54), which is set forth in the Appendix hereto (p. 23, *infra*).

Statement of the Case

Petitioners' statement of the case cannot be accepted. It omits any statement of the allegations of the complaints in the *Cadman* case and the present action, and any statement of the decision of the New York Court of Appeals in the *Cadman* case and of the decisions of the District Court and Court of Appeals in the Present action. Petitioners thus present an unintelligible discussion of academic questions posed without any reference to the issues presented and decided in either the *Cadman* case or present action. The proper application of the tests of *res judicata*—about which there is no dispute—cannot be perceived or determined on such a presentation detached from any consideration of the facts and issues presented and determined in the two cases which must be compared.

We therefore restate the facts.

The Basis of Union

For several years prior to 1947 a Commission on Interchurch Relations and Christian Unity of the General Council of Congregational Christian Churches of the United States, an unincorporated association comprising both laity and clergy representing associations and state or district conferences of Congregational Christian churches, and a committee representing the Evangelical and Reformed Church, conducted studies and negotiations looking toward a union of Congregational Christian Churches and the Evangelical and Reformed Church into the United Church

of Christ (151b; 306 N. Y. at 161). These studies and negotiations resulted in the formulation of a Basis of Union in January, 1947 (151b; 306 N. Y. at 161). The Basis of Union with Interpretations (47b-48b), hereinafter collectively referred to as the Basis of Union, was then submitted by the General Council to the individual Congregational Christian churches, associations and conferences for advice (151b; 306 N. Y. at 161). As more than 72% of the churches voting and 90% of the associations and conferences approved, the General Council regarded this approval as substantially affording the advice which it sought, and at its meeting in February, 1949, voted to consummate the plan of union, which was likewise approved by the Evangelical and Reformed Church (151b; 306 N. Y. at 161).

The union, as contemplated and outlined, was a voluntary uniting of churches, associations and conferences, preserving the autonomy of each in its sphere (Basis of Union III, par. H; Interpretations (d) 48b). It would in no wise abridge the rights previously enjoyed by the churches, including but not limited to freedom of worship and education and the right of holding and operating their own property and retaining or adopting their own regulations (151b-152b; 306 N. Y. at 161). The General Council of Congregational Christian Churches and the General Synod of the Evangelical and Reformed Church, the top bodies of the two denominations, were to unite to form the General Synod of the United Church of Christ (Basis of Union X, pars. B & C). The boards, agencies and instrumentalities affiliated with the two denominations, such as missionary, educational and pension bodies, were to be united (Basis of Union VIII; X, par. D). A constitution for the United Church of Christ based on the principles set forth in the Basis of Union was to be prepared by the General Synod and was to come into force when ratified by two-thirds of the Congregational Christian Churches voting (Basis of Union IV, par. A). That constitution was prepared and was declared in force on July 4, 1961.

The *Cadman* Case

In the *Cadman* case, commenced in April, 1949, the Basis of Union and proposed union were attacked by the two plaintiffs therein, the Cadman church, an unincorporated religious body conducting the services and religious activities of the congregation, and the Cadman Society, a religious corporation having custody and control of the temporalities and property of the congregation. The action was brought as a representative action on behalf of all Congregational Christian churches. The defendant in the action was the General Council of the Congregational Christian churches. The theory of the complaint was that, as the essence of Congregationalism is the autonomy of the individual church and as the Evangelical and Reformed Church was a unitary church organization with a presbyterian form of government, union between the two groups would be incompatible with Congregationalism (153b; 306 N. Y. at 162). The complaint alleged that the various boards, agencies and instrumentalities affiliated with the Congregational Christian churches were "under the direction or control of or affiliated or associated with or supported or managed by the Congregational Christian churches, through said General Council or otherwise" (11b) and that the General Council, unless restrained, would consummate the plan of union, including a merger or consolidation of the boards, which action would deprive Congregational Christian churches desiring to continue as Congregational Christian churches, without becoming members of the United Church of Christ, of their representation in the General Council and of their interest in the Congregational boards and agencies, the funds of which would be mingled with the funds of other unrelated religious organizations and diverted from the uses and purposes to which they were dedicated and to which Congregational Christian churches had the right to have them applied (11b-13b). The relief requested was (1) a declaration that the General Council had no power or authority to carry out the Basis of Union,

that any Congregational Christian church which united with the new church would remove itself from the Congregational Christian fellowship and cease to have any interest in the Congregational Christian agencies, and that the Congregational Christian churches which did not unite with the new church would remain the Congregational Christian Churches in control of the Congregational Christian agencies; and (2) an injunction against the General Council's consummating the union or merging any of the Congregational Christian agencies with the Evangelical and Reformed agencies (16b, 17b).

After a trial the Supreme Court of New York rendered a decision and opinion directing judgment on the merits for plaintiffs (77b-110b; 197 Misc. 124). By stipulation, this opinion constituted findings of fact and conclusions of law (119b). Thereafter judgment was entered, pursuant to the opinion, containing various declarations and an injunction against the General Council (111b-118b). Upon appeal, the Appellate Division, Second Department, one justice dissenting, reversed the judgment of the trial court on the law and facts and dismissed the complaint (279 App. Div. 1015, 1074; 120b, 125b, 136b, 142b); and thereafter a judgment of reversal was entered (X-14; 145b-147b). Upon further appeal, the New York Court of Appeals, two judges dissenting, affirmed the judgment of the Appellate Division, finding that "the complaint was properly dismissed on the merits" (306 N. Y. 151; 148b-165b); and thereafter, pursuant to the Court of Appeals' order and judgment of affirmance (X-17; 166b-168b), final judgment was entered in the Supreme Court (X-20; 171b-172b).

The New York Court of Appeals' Decision in the *Cadman* Case

Two claims were asserted and adjudicated in the *Cadman* case. The first claim was that the Basis of Union provided for a union which would abridge the autonomy of individual churches and thus destroy or materially alter the

nature of Congregationalism. The other claim was that property rights possessed by Congregational Christian churches in the funds and assets of the General Council, its boards, agencies and instrumentalities, would be diverted from the uses and purposes for which they were set up and the non-assenting churches would thus be deprived of their interests in those funds.

As to the first claim, the New York Court of Appeals found that under the Basis of Union no church, association or conference or their members would be subject to any control by the United Church in respect to either their spiritual or their temporal affairs, that the proposed union would in no way change the historical and traditional pattern of the individual Congregational Christian church, that there could be no fear that any action taken by the General Council leading to consummation of the Basis of Union would in any way obligate the individual church to join in the union except through its own voluntary action, that each member church would continue to possess the same freedom of faith and manner of worship as theretofore enjoyed, and that there would be no interference in or abridgement of Congregational usage and practice (151b-152b, 154b; 306 N. Y. at 161, 163). The Court therefore held, "No ecclesiastical question is presented" (154b; 306 N. Y. at 163).

As to alleged property rights in the Congregational Christian boards, agencies and instrumentalities, after noting that there was no question raised with respect to express trusts and that plaintiffs' claim related only to an "alleged beneficial interest in general funds belonging to and used by various boards and agencies in carrying out their respective functions," the New York Court made a review of the charter authority and function of each of the boards and agencies, and found that, while the name "Congregational" appears in most of the agencies, "their express purposes are nonetheless very broad and in no way

limited to furthering any particular religious viewpoint, dogma or confession of faith" and "would not be violated by uniting with any other similar charitable and religious organization" (156b, 157b; 306 N. Y. at 164, 166). The general funds of these agencies were found to have been voluntarily contributed and without restriction as to use or application (158b; 306 N. Y. at 166).

In summary of the plaintiffs' property claim and as its own conclusion, the Court said (158b-159b; 306 N. Y. at 166):

> "Notwithstanding that the above-listed boards and agencies are corporations authorized and existing under the laws of several different States, the plaintiffs nonetheless contend that such boards and agencies have in fact no separate and independent status because their boards of trustees, officers and administrators are drawn from the membership of the General Council and that their activities, are, for all practical purposes, controlled and supervised by the General Council—that diversion of their funds and assets and mingling of same with the funds of others is an interference to its detriment in a property interest belonging to the Cadman Church and other nonassenting churches. This, however, is not established in fact as the proof shows and, it is conceded, the Cadman Church has not contributed any funds, except as we have seen, for other than a general corporate purpose and these voluntarily and without restriction as to use or application. Under such circumstances it must be assumed that such funds were general gifts for use by the corporations in connection with their general corporate purposes. Such voluntary unrestricted contributions for a general charitable and religious purpose create no proprietary or beneficial interest warranting the civil courts in interfering in their expenditure so long as it appears that such use and application is not violative of charter purposes. * * *
>
> "* * * Absent a showing that any fiduciary obligation imposed by the charters or certificates of incorporation of any board or agency will be violated

> or that such violation is imminent or threatened, there is no basis or necessity for a declaratory judgment enjoining the General Council in any respect, nor may any restraining order issue against the various corporate boards and agencies, the Evangelical and Reformed Church or the United Church of Christ, as they have not been made parties defendant and are not before the court".

Finally and overall, the Court said (159b; 306 N. Y. at 167):

> "On this record, the proof having established that the Basis of Union is voluntary and in no way interferes with Congregational faith or manner of worship, and the plaintiffs having failed to establish any direct or beneficial interest in and to the unrestricted funds of the General Council, its various boards, agencies and instrumentalities, and having failed to show that any such general funds are to be used for other than authorized charter purposes, the complaint was properly dismissed on the merits".

The Present Action

Three and one-half years after the final judgment of the New York Court of Appeals and dismissal of the complaint in the *Cadman* action, the present action was instituted by the present plaintiffs, represented by the same attorneys who represented the plaintiffs in the *Cadman* action.

The plaintiffs are four Congregational Christian churches and nine individuals who are members of Congregational Christian churches, four of whom are ministers of churches and members of the General Council and/or members of one or more of the boards, and one of whom is a member of the General Council and two of the boards. They purport to sue both individually and representatively on behalf of all Congregational Christian churches, members, ministers and members of the General Council and boards. The defendants are the General Council, the

boards, agencies and instrumentalities affiliated with the Congregational Christian denomination and the Evangelical and Reformed Church. Added as defendants, after institution of the action, are the National Council of Congregational Churches and the co-presidents of the United Church of Christ.

The essence of the complaint (95a, 96a, 101a), as of the *Cadman* complaint, is that the General Council has no power to adopt and carry out the Basis of Union, and that the Basis of Union is invalid in attempting to unite religious bodies of different type and character, in abridging the autonomy of churches and in attempting to impress churches and their members into the United Church without affirmative action on their part, and in depriving the churches and their members and ministers of their rights in the boards, as agencies of the Congregational Christian Churches which have been maintained by contributions from Congregational Christian churches and their members. Complaint was then made against defendants' taking enumerated steps to carry out the Basis of Union. The relief requested was a declaration that the Basis of Union is invalid in its various provisions; that churches, members and ministers cannot be regarded as part of the United Church of Christ except by affirmative action on their part; that churches which join the United Church of Christ will "thereby cease to be churches of the Congregatonal Christian faith and order" (328a); that churches which do not join the United Church of Christ will be "The Congregational Christian Churches" (328a); and that the boards of the two denominations cannot proceed to unite as provided in the Basis of Union (321a-322a).

In short, despite an elaboration of verbiage and proliferation of parties, the claims made in the instant action are exactly the same claims as those made in the *Cadman* action.

The Motion Before Judge Dawson

Defendants' first step in the present action was to move to dismiss the complaint on the ground of *res judicata*. Judge Dawson denied the motion, holding that there were triable issues of *res judicata* which could not be decided by summary judgment (49a). The questions delineated by Judge Dawson for a trial determination were whether, as plaintiffs contended, (1) plaintiffs herein have interests in the funds of the General Council, its various boards, agencies and bodies which were not represented by the plaintiffs in the *Cadman* case, and (2) the facts at the time of institution and trial of this action were substantially different from the facts considered by the Court of Appeals in the *Cadman* case.

Upon denial of their motion to dismiss the complaint, defendants answered and pleaded *res judicata* and the case was assigned to District Judge Dimock for all purposes (2a).

The Proceedings Before Judge Dimock

In September, 1959, the defendants moved for an order directing a preliminary trial of the issues of *res judicata*, which motion was granted by Judge Dimock by opinion filed in December, 1959 (3a, 63a-70a). Pre-trial hearings were held on eleven days in January, March, April, May, June and October of 1960, during the course of which three separate pre-trial orders were entered (3a, 242a, 245a, 247a).

At the first pre-trial hearing called by Judge Dimock, defendants requested that plaintiffs be required to specify the interests in the boards which they claimed to have which the class represented by the plaintiffs in the *Cadman* case did not have, and the facts existing at the present time which were claimed to be different from the facts which were before and/or contemplated by the New York courts in the *Cadman* case. By pre-trial orders Nos. 1 and 2, Judge Dimock directed plaintiffs to submit such specifica-

tions (242a-246a), allowing them even to specify "other interests" in the boards and agencies, which they belatedly claimed to have, in addition to their alleged "interests in the funds" of the boards and agencies. The specifications which plaintiffs finally filed (276a-317a) pursuant to these pre-trial orders became the key to the consideration and determination of this action, because they demonstrated, even when accepted at face value, that plaintiffs in the present action represent no different interests from those represented by the plaintiffs in the *Cadman* case and that there has been no change in the factual situation since the *Cadman* decision which would warrant any different decision in the present action.

The trial commenced on November 1, 1960 and continued for six days in that month. After the record was complete with all relevant evidence, defendants rested and plaintiffs moved to strike the affirmative defenses of *res judicata* for failure of defendants to establish a *prima facie* case (R. 17-22).

On March 31, 1961, the District Court rendered its opinion denying plaintiffs' motion (11a-34a). The opinion was a full coverage of every facet of the case, concluding:

> "The result of all of the foregoing is that defendants by their proof have made out a prima facie case of *res judicata* against all of the claims of all of the plaintiffs. While plaintiffs are entitled to adduce any evidence at their command to controvert defendants' proof of *res judicata*, defendants' evidence has not been of a character where any issue of fact can be raised and it is difficult to imagine an affirmative defense to a plea of *res judicata*. Nevertheless, there will be a formal resumption of the trial of the issue of *res judicata* at a time in the near future to be fixed by arrangement with my chambers."

The resumed trial continued for four days in June 1961 (R. 1903-2305A). Plaintiffs complain that the trial court

refused to receive in evidence proffered testimony of "expert" witnesses as to the meaning of the Basis of Union and Constitution of the United Church and additional proffered documentary materials. The "expert" testimony was rejected on an offer of proof because it was not needed as an aid to the court in construing and comparing the Basis of Union and Constitution and upon the further ground, upon which the additional documentary evidence was rejected, that it was merely cumulative and superfluous as the court had accepted plaintiffs' relevant "specifications" at face value (R. 2052, 2276, 2279, 2291).

At the conclusion of the trial, the District Court granted defendants' motion for judgment dismissing the complaint, holding, on the basis of the facts and conclusions set forth in its opinion of March 31, 1961, that the *Cadman* case was in fact and in law an adjudication of all claims asserted by plaintiffs in the present action (R. 2303). The District Court judgment recited that the statements contained in its March 31, 1961 opinion constituted the findings of fact and conclusions of law upon which its final decision and judgment were based (9a-10a).

The Court of Appeals Decision

The judgment of the District Court was unanimously affirmed by the United States Court of Appeals and all of the arguments here advanced by the petitioners were rejected (X3, X13). The Court of Appeals succinctly stated and determined the issues:

> "The issues raised by the appeal can be stated very simply: What was decided by the New York courts in the *Cadman* litigation? and who is bound by that determination under principles of *res judicata?* Plaintiffs maintain that the *Cadman* judgment cannot affect them, because they were not parties in that action and were neither in privity with nor represented by either of the two plaintiffs. They also maintain that the defendants in the present suit

are not the same as those in *Cadman* and thus cannot plead that judgment in bar. Finally, plaintiffs contend that the dismissal of the *Cadman* complaint was solely for failure to join indispensable parties—a flaw they claim to have corrected. Since jurisdiction in this suit is grounded on diversity of citizenship, we look of course to the law of New York to determine these issues (X9).

• • •

"It is our conclusion that as to the issues actually raised and resolved by the New York Court of Appeals in *Cadman*, the plaintiffs therein and the present plaintiffs form one class having common interests, and all were adequately represented by the Cadman Church and Society. Since no legal issue not determined by *Cadman* is raised by the present complaint, the judgment of the district court dismising plaintiffs' complaint must be affirmed (X11).

• • •

"The final point raised is whether those defendants in this case who were not parties in *Cadman* may plead that decree as *res judicata*. Since all the defendants herein have the same interests as the General Council, which defended the *Cadman* litigation, they under the law of New York may claim the benefit of that decision, even if they may not be made to bear its burdens. *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116, 134 N. E. 2d 97, 151 N. Y. S. 2d 1; *Gart* v. *Cole*, 2 Cir., 263 F. 2d 244, certiorari denied 359 U. S. 978" (X13).

The Petition Should Be Denied Because the Decision of the District Court and Court of Appeals Are Manifestly Correct and No Reason for Granting a Writ Is Shown

A reading of the opinions in the District Court and Court of Appeals, which petitioners elect to ignore, are both the clearest exposition of the case and clearest demonstration of the correctness of the decision reached.

Only by ignoring the opinions in all courts, both in the *Cadman* case and present action, and by erroneous state-

ments of and off the record, are petitioners able to contrive an argument. The argument is demonstrably insupportable by any reference to the record and decisions of the several courts involved.

We shall not make a correction of all of plaintiffs' misstatements or reply to all arguments, but shall comment briefly and sufficiently on major errors of statement and argument.

There is no "schism" among Congregational Christian churches, as plaintiffs state (Petition, p. 16) without a record citation. The fact is that the vote of the Congregational Christian churches voting up to May 1961 on approval of the Constitution of the United Church was 93% in favor of the union (R. 1923). The union is thus virtually completed and almost fully supported and the controversy which a few would carry on does not deserve the further attention of this Court.

Judge Dawson, in denying defendants' motion for summary judgment on the ground of *res judicata*, made no such "holding," as petitioners suggest (Petition, pp. 7, 37, 38), that the *Cadman* decision was not *res judicata* as to the present action. Judge Dawson merely decided that there were triable issues as to *res judicata* which should not be summarily decided. The issues were left to the trial held before Judge Dimock.

Petitioners with gross inaccuracy and unfairness to the District Court state that they were accorded only a "pro forma" trial (Petition, pp. 8, 38, 40). Plaintiffs were accorded the widest latitude and utmost indulgence in the exposition of their contentions, as a glance at the pre-trial and trial record makes apparent. The determination of the District Court was made on the basis of taking plaintiffs' specifications of "interests," which they allegedly had and which the *Cadman* plaintiffs allegedly did not have, and

their specification of the alleged "changes" in the facts between the trial of the *Cadman* case and the trial of the present action, at face value, and deciding that plaintiffs' own specifications, elaborated by unlimited argument of plaintiffs' counsel, disclosed no different interests or facts which would avoid the applicability of the principles of *res judicata* (R. 164, 165, 774, 786-787, 2013, 2052, 2084-2086, 2088). As one counsel in the case aptly remarked, the trial judge indulged plaintiffs with a "patience beyond anything required by either the Old or New Testament".

The testimony which petitioners complain of not being permitted to adduce was only proffered "expert" testimony as to the meaning of written documents, the Basis of Union and Constitution of the United Church, which the court held were clear on their face and required no exposition from the witness stand (R. 2276-2277). Contrary to petitioners' assertion (Petition, pp. 8, 40), the court did allow plaintiffs to place the proffered testimony on the record in the form of an offer of proof (R. 2245), from which it may readily be seen that the proffered testimony was properly not received.

Petitioners contend that the decisions rendered by the District Court and Court of Appeals are in conflict with applicable decisions of this Court and the New York Court of Appeals (Petition, pp. 17-33). The argument, without reference to the decisions of any of the courts in either the *Cadman* or present actions, is no more, however, than a citation of cases and assertion that the recognized principles of *res judicata* were not properly applied in the instant case.

There is no question here about the principles of *res judicata*. Indeed, there is no question either of fact or law in this case. The case is entirely one of the application of unquestioned rules of *res judicata* to the unquestioned facts of the case. The opinion of the New York Court of Appeals in the *Cadman* case and the opinions of the District Court

and Court of Appeals in this case make it clear that the *Cadman* decision is *res judicata* as to the present action in accordance with the very principles of *res judicata* cited by petitioners.

The whole of petitioners' argument comes down to the contention that the *Cadman* decision decided nothing, that it was no more than a dismissal of the action for want of essential parties, and that the entire extensive decision of the New York Court of Appeals, ending with the conclusion that the "complaint was properly dismissed on the merits", was merely dicta (Petition, pp. 19, 20, 30). This absurd contenton was given short shrift by both the District Court and Court of Appeals. The Court of Appeals, like the District Court, gave the closest examination to the "full" opinion of the New York Court of Appeals and necessarily found that it was, as that court stated, a determination "on the merits," rather than an intellectual exercise to no point or purpose as petitioners try to make out.

Plainly there was no absence of an essential party to the determination made by the New York Court of Appeals in the *Cadman* case and that Court did not intimate in the one sentence of its opinion on which plaintiffs wholly rely that there was any absence of an essential party or that it was dismissing the complaint for lack of any essential party.*

* The one sentence in the New York Court of Appeals' twelve-page decision to which plaintiffs attach all importance reads: "Absent a showing that any fiduciary obligation imposed by the charters or certificates of incorporation of any board or agency will be violated or that such violation is imminent or threatened, there is no basis or necessity for a declaratory judgment enjoining the General Council in any respect, nor may any restraining order issue against the various corporate boards and agencies, the Evangelical and Reformed Church or the United Church of Christ, as they have not been made parties defendant and are not before the court" (158b-159b; 306 N. Y. at 166). Immediately thereafter and concluding its opinion the New York court said: "On this record, the proof having established that the Basis of Union is voluntary and in no way inter-

The New York Court had before it the General Council of Congregational Christian Churches which had formulated the Basis of Union and which, as alleged in the *Cadman* complaint, threatened to carry out the Basis of Union and would carry it out unless restrained. Clearly, therefore, the General Council was the only necessary defendant in a class action to determine the validity of the Basis of Union and the propriety of its consummation. Equally clearly, on the basis of the allegations of the *Cadman* complaint that the boards were agencies of the churches controlled by the General Council (11b, Cadman complaint, par. 22) and the finding of the trial court in the *Cadman* action that the funds of the boards had been accumulated by the boards "as agencies of the General Council and as agencies in turn of all the Congregational Christian churches" (100b), the New York Court of Appeals, accepting this jurisdictional premise, proceeded to determine the issue of plaintiffs' alleged property interests in the funds of the boards, and, after the fullest consideration of the boards' charters, concluded that plaintiffs had failed to establish any interest in the funds of the General Council, its various boards, agencies and instrumentalities or that such funds were to be used under the Basis of Union for other than authorized charter purposes (158b-159b; 306 N. Y. at 166).

In the light of the all-inclusive presentation and determination of the issues in the *Cadman* case, there is no basis whatever for suggesting that the dismissal of the complaint was nothing more than a dismissal for lack of jurisdiction due to the absence of necessary parties. On the contrary, it is clear, as the New York Court of Appeals held and as the District Court and Court of Appeals held, the

---

feres with Congregational faith or manner of worship, and the plaintiffs having failed to establish any direct or beneficial interest in and to the unrestricted funds of the General Council, its various boards, agencies and instrumentalities, and having failed to show that any such general funds are to be used for other than authorized charter purposes, the complaint was properly dismissed on the merits" (159b; 306 N. Y. at 167).

determination was a complete adjudication of all issues presented.*

Petitioners' companion contention (Petition, pp. 25-27) that the decision of the New York Court of Appeals adjudicated nothing because no declarations were given and the complaint was simply dismissed "on the merits" is similarly frivolous. Under New York law a dismissal of a complaint in an action for a declaratory judgment is, as in any action, in and of itself sufficient to constitute *res judicata*. *Terraqua Corporation* v. *Emigrant Industrial Savings Bank*, 191 Misc. 302, 77 N. Y. S. 2d 689 (N. Y. Co. 1947); aff'd 273 App. Div. 254, 76 N. Y. S. 2d 610, leave to appeal den. 297 N. Y. 1041; *Campbell* v. *Nassau County*, 192 Misc. 821, 82 N. Y. S. 2d 179 (Nassau Co. 1948), aff'd 274 App. Div. 929, 83 N. Y. S. 2d 511; *United States ex rel. Bauer* v. *Clark*, 161 F. 2d 727 (2nd Cir. 1947); *Cold Metal Process Co.* v. *E. W. Bliss Co.*, 21 F. Supp. 509 (D. C. Del. 1937). New York C. P. A. § 482 makes a dismissal of a complaint at the close of the evidence a final determination on the merits unless the court shall specifically make such dismissal without prejudice. Since actions for a declaratory judgment are not excluded from the provisions of this section, the

* Plaintiffs (Petition, p. 24) refer to a footnote in the opinion of the United States Court of Appeals and argue from the observation there made that it is unclear whether the New York Court of Appeals upheld the Basis of Union on the merits or because the question of its invalidity was beyond the cognizance of the civil courts. The New York Court of Appeals, after fully considering the polity question, decided that there was no infringement of Congregational principles in the Basis of Union, hence "no ecclesiastical question is presented." But, as the United States Court of Appeals stated in the footnote referred to, "It would make no difference to resolution of the issues presented here which of these grounds of decision was in fact adopted" because, as the Court had stated in the body of its opinion, "The questions of the validity of the General Council's action and its effect on individual congregations were legal issues in which all the present plaintiffs have the same interest as the *Cadman* plaintiffs, and to which the differences as to their various situations are irrelevant; and thus as to these questions the decree is binding on all" (X 12).

final judgment in the *Cadman* case was on the merits without any recital to that effect. But the New York Court of Appeals at the close of its decision noted that the dismissal was on the merits (159b). Further, the opinion of the New York Court of Appeals was full in its coverage and disposition of all the claims advanced by plaintiffs. Further also is the fact that the *Cadman* action was for an injunction against consummation of the union by the General Council as well as for a declaration of invalidity of the Basis of Union. Affirmance by the New York Court of Appeals of a judgment denying such an injunction was clearly a determination on the merits that it was proper for the merger to go forward. There is no basis for an argument, therefore, that because the decision did not carry a declaratory judgment label it was not an adjudication and *res judicata*.

All of the defendants in the present action are entitled to the benefit of that adjudication, regardless of whether they were bound by it, on the basis of the law of New York as established by the New York Court of Appeals in *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116, as recognized by the Second Circuit Court of Appeals in *Gart* v. *Cole*, 263 F. 2d 244, certiorari denied 359 U. S. 978, and in its opinion in this case.

Finally, because their tactics of seeking two "days" in court, one in the state court and another in the federal court, on the same claims have not been availing, plaintiffs complain that the net effect of the decisions below is to "whipsaw" them between the state and federal courts (Petition, p. 21). The image which plaintiffs thus see is only the reflection of their own attempt to play fast and loose between two courts.

Plaintiffs have had more than their due in court consideration of their claims. Their claim of lack of due process in that consideration is hollow indeed. It is they who wilfully refuse to recognize due process and the essential and salutary principles of *res judicata*.

Conclusion

Although the issues herein are admittedly of importance, they have been decided in conformity with long established rules relating to class representation and *res judicata*. There is no federal issue of general interest which would justify intervention by the Supreme Court. Nor is there any conflict between the decision below and any applicable decision of this Court or the law of New York. Plaintiffs have received abundant court consideration with the utmost in due process, and at long last *res judicata* should have its due in this controversy.

The petition should be denied.

Respectfully submitted,

LOREN T. WOOD,
Attorney for all Respondents other than American Board of Commissioners for Foreign Missions and Evangelical and Reformed Church.

PAUL D. MILLER,
Attorney for Respondent Evangelical and Reformed Church.

ORRIN G. JUDD,
Attorney for American Board of Commissioners for Foreign Missions.

JOHN W. MUELLER,
Co-Counsel for Evangelical and Reformed Church and added Respondents, Hoskins and Wagner.

DAVID W. PECK,
JOHN T. REDMOND,
of Counsel.

January 25, 1963.

APPENDIX

New York Civil Practice Act

Section 482. Effect of Judgment Dismissing Complaint.

A final judgment dismissing the complaint before the close of the plaintiff's evidence does not prevent a new action for the same cause of action, unless it expressly declares that it is rendered upon the merits. A dismissal of a complaint or a counterclaim at the close of the plaintiff's or defendant's evidence, as the case may be, or a dismissal of a complaint or counterclaim at the close of the whole evidence, is a final determination of the merits of the cause of action and bars a new action between the same parties or their privies for the same cause of action unless the court shall dismiss without prejudice.